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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 944

HERSHEY MFG. CO., AN ILLINOIS CORPORATION,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, INDIVIDUALLY AND AS STATE'S ATTORNEY OF COOK COUNTY; JOSEPH D. LOHMAN, INDIVIDUALLY AND AS SHERIFF OF COOK COUNTY; TIMOTHY J. O'CONNOR, INDIVIDUALLY AND AS COMMISSIONER OF POLICE OF THE CITY OF CHICAGO; WILLIAM G. MILOTA, INDIVIDUALLY AND AS BAILIFF OF THE MUNICIPAL COURT OF CHICAGO; AND LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM.

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MOTION TO AFFIRM.

The appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT.

The decision of the majority of the District Court, entered on February 9, 1959, turned on three grounds: (1) The Court did not have jurisdiction of the action; (2) the District Court should dismiss the complaint which asks a decision on the merits concerning unresolved questions of state law and questions of constitutional law never before decided by the State Supreme Court; and (3) the appellant is not entitled to equitable relief because it has many adequate remedies at law which are provided by the Illinois courts.

ARGUMENT.

The majority decision of the United States District Court is correct as to all three grounds upon which it is based.

I.

The complaint does not present a substantial federal question within the original jurisdiction of the District Court, as required by the provisions of Title 28, U. S. C. A., Section 1331. The alleged federal question is only remote and conjectural and awaits the prior judicial determination of unresolved non-federal questions of state law—a determination, which is properly the business of the State court, and which might terminate the litigation.

In its complaint, the appellant alleges that the challenged provisions of Chapter 38, Sections 344-348, Ill. Rev. Stats. have not been judicially interpreted so as to apply to slot-machine sub-assemblies and parts. It has never abandoned this claim. The contention was repeated in its "Motion to Vacate". During the course of oral argument on April 14, 1959, its counsel stated that the federal court must first determine the non-federal question of the applicability of the Illinois statute to the appellant's devices—a question heretofore undecided by any Illinois court (Tr. 12).

Furthermore, the judicial resolution of the non-federal question of the applicability of the challenged statute will not set the stage for a decision on the alleged federal question. It is then incumbent upon the District Court to ascertain whether the appellants' slot-machine sub-assemblies and parts enjoy the status of lawful property so as to enjoy any constitutional protection. If the State of Illinois has enacted legislation, other than the challenged

statute, which deals with the appellant's devices, the District Court is entitled to take judicial notice thereof in order to resolve this basic and paramount question. *Bowen* v. *Johnston*, 306 U. S. 19, 23.

Although the appellant has focused its attack solely upon the provisions of Chap 38, Sec. 344 *et seq.*, Ill. Rev. Stats., the State of Illinois has also legislated on the same subject matter, namely gambling devices, in Chap. 38, Sections 341-343, Ill. Rev. Stats. These latter provisions, particularly Section 342 have been construed by the Supreme Court of Illinois in *People* v. *One Device*, 410 Ill. 318, 321-322. That court determined that devices which are manufactured, made, or kept for gambling purposes and have no potential for lawful use, are gambling devices *per se* and are not the lawful subjects of property. They are not, therefore, within the protection of the law, and their seizure and destruction does not result in a violation of any constitutional provisions. Irrespective of the challenged provisions, namely Chap. 38, Sec. 344 *et seq.*, Ill. Rev. Stats., the provisions of Chap. 38, Secs. 341-343, Ill. Rev. Stats. still classify the subject matter of this litigation as contraband and deprive it of any status of lawful property. Only lawful property, and not contraband, is protected by the federal constitution. The seizure of such contraband devices does not violate the due process clause of the federal constitution. *Lawton* v. *Steele*, 152 U. S. 133, 136, 142-143; *Durant* v. *Bennett*, 54 F. 2d 634, 638-639. Furthermore, such contraband devices cannot find a protective sanctuary in the commerce clause of the federal constitution. *Sligh* v. *Kirkwood*, 237 U. S. 52, 60; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 139.

In its "Motion to Vacate," however, the appellant takes the position that the provisions of Chap. 38, Secs. 341-343, Ill. Rev. Stats. are not applicable to its devices. In effect, it is challenging the applicability of any Illinois statute to

the subject matter of this litigation. We submit that this contention cannot fortify the appellant's position in the United States District Court. On the contrary, it only serves to emphasize the lack of a substantial federal question in this cause.

If a case can be decided on either of two grounds, one involving a federal question, the other a question of statutory construction or general law, a federal court will decide only the latter. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347. On this basic and traditional principle, the federal court must first decide whether the appellant's slot-machine sub-assemblies and parts, fall within the prohibition of any Illinois statute—an issue which has never been determined by the Supreme Court of Illinois. If this issue is decided in the appellant's favor, the litigation is terminated and the federal question remains undecided. Though a federal right is pleaded, there is no certainty that it will ever be disputed.

A case in this posture, however, is not a controversy arising under the Constitution or laws of the United States of which the District Court has original jurisdiction. The federal right must be an essential element of the appellant's cause of action. It must be necessary to the ultimate decision, and the decision must rest upon a construction of that right. The federal right must be the subject of a genuine and present controversy, not merely a possible or conjectural one. The fact that a question of federal law is lurking in the background, awaiting the prior determination of other non-federal issues, is insufficient to support the original jurisdiction of the United States District Court. *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 112-113, 117.

Before the federal court can embark upon any judicial examination of the alleged federal rights, it must first adjudicate the question of the applicability of the chal-

lenged statute to the appellant's slot-machine sub-assemblies and parts. It must also decide whether the other cited Illinois statutes apply to the appellant's devices in order to ascertain whether those devices are contraband or lawful property within the protection of the law. If the devices are contraband, they are not entitled to any legal protection. The genuineness of the alleged violation of federal rights vanishes.

Basically, this litigation presents a controversy, the resolution of which rests primarily upon the determination of the applicability of Illinois statutory law to the subject matter of this litigation—a question which has never been determined by the Supreme Court of Illinois. At the very threshold the District Court is faced with questions, which properly belong to the Illinois court. The decision on those non-federal issues might dispose of the entire litigation. Whether the federal court will ever reach any question of federal law is only a matter of conjecture at this stage of the proceeding. The need for a judicial determination may never present itself. In accordance with the *Gully* doctrine, a controversy in this posture does not present a sufficiently substantial federal question as would support the original jurisdiction of the United States District Court.

The decisions in *Doud* v. *Hodge*, 350 U. S. 485 and *Toomer* v. *Witsell*, 334 U. S. 385, are clearly inapplicable.

In *Doud*, the *original* jurisdiction of the United States District Court was never challenged. There was no question that the challenged act applied to the plaintiff in his business. *Doud* v. *Hodge*, 127 Fed. Supp. 853, 856. The act which regulated a lawful business had been interpreted by the Supreme Court of Illinois, and this was recognized by the federal courts. *Doud* v. *Hodge*, 127 Fed. Supp. 853, 856; *Doud* v. *Hodge*, 146 Fed. Supp. 887, 891; *Morey* v. *Doud*, 354 U. S. 457, 460, 464, 465. The only question for

judicial determination was the federal constitutional issue. All preliminary issues of state law had been resolved. As a matter of fact, during the proceedings of April 14, 1959 (Tr. 43-44), counsel for the appellant practically conceded that this case did not apply.

In *Toomer*, it is clear that there were no unresolved questions of state law except the statute relating to state income taxes. *Toomer* v. *Witsell*, 334 U. S. 385, 392. As to the state income tax statute, this Court held that the District Court did not have jurisdiction to entertain it. *Toomer* v. *Witsell*, 334 U. S. 385, 406.

Furthermore, it is clear that the District Court noted diversity of citizenship as a ground for federal jurisdiction. *Toomer* v. *Witsell*, 73 Fed. Supp. 371, 374. The same is true in *Lee* v. *Bickell*, 292 U. S. 415; *Bickell* v. *Lee*, 5 Fed. Supp. 720, 721, and *Modern Woodmen of America* v. *Casados*, 15 Fed. Supp. 483, 484. In those cases, the jurisdiction of the federal court is grounded upon the diverse citizenship of the parties, regardless of the nature of the issues presented. Under the law, it could hear those cases even though *no* federal questions were presented.

We further submit that the cases of *United Airlines* v. *Public Utilities Commission*, 109 Fed. Supp. 13 and *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, do not support the appellant. In those cases, there was no question as to the applicability of the state law. The attention of the court was directed to the issue as to whether the federal statute had preempted the field and thereby excluded the jurisdiction of the state. Federal preemption, by the very nature of the concept, presupposes a federal statute and a state statute, both of which are *unquestionably* applicable in the same area. If, however, there is a genuine controversy, as in the case before the bar, as to the applicability of a state statute, any thoughts of preemption are pre-

mature. If the state statute is determined to be inapplicable, nothing remains to be preempted.

In the case before the bar, the challenged act is a criminal statute in the strictest sense of the term, which has never been interpreted by the Supreme Court of Illinois. Whether any of the Illinois gambling statutes apply to the appellant's devices is yet to be determined by the Supreme Court of Illinois. This question of state law must be resolved before any court can consider any federal rights. Such questions of statutory meaning and application are properly the business of a state court.

II.

If we assume, *arguendo*, that there is original federal jurisdiction in this cause, we submit that the doctrine of "discretionary abstention" is properly applicable in this action. In view of the dualism of sovereignty in the United States, it is the announced policy of the federal courts not to interfere with the enforcement of state criminal statutes. *Watson* v. *Buck*, 313 U. S. 387, 400-401; *Douglas* v. *Jeannette*, 319 U. S. 157, 162-164; *Stefanelli* v. *Minard*, 342 U. S. 117, 120-122.

It should be noted that in the last two cited cases, the federal court refused to interfere even though it did *in fact* have jurisdiction of the controversy. *A fortiori*, the doctrine should be invoked in the case before the bar where, it is submitted, the District Court lacks original jurisdiction.

Congress has always been conscious of the sensitive relationship between the federal government and the several states. By its legislation, it has sought to prevent any conflict by refusing to vest the federal courts with jurisdiction over vital state matters until all methods of state relief have been exhausted.

The underlying philosophy of the three-judge court provisions is the prevention of improvident interference with state government and possible conflict between the federal and state authority. *Phillips* v. *U. S.*, 312 U. S. 246. State court proceedings shall not be stayed by a federal court except as expressly authorized by an Act of Congress. Title 28, U. S. C. A., Section 2283. A federal court is not empowered to examine the validity of a state court conviction until all available state remedies have been exhausted. Title 28, U. S. C. A., Section 2254. The federal courts have no jurisdiction to interfere with matters of state revenue where the state affords a speedy and efficient remedy. Title 28, U. S. C. A., Section 1341. The federal court is empowered to interfere with rate orders of state agencies only under limited circumstances. Title 28, U. S. C. A., Section 1342.

This rule of non-interference has also been announced and exercised by this Court in cases involving state criminal prosecutions of federal officers—an area wherein one might expect the federal interest to prevail. Prompted by judicial caution, it has sanctioned federal intervention in those few narrow situations where the alleged criminal act was an act lawfully performed in the discharge of federal duty. The federal immunity was not extended to any act, which was not justified by federal duty. *Drury* v. *Lewis*, 200 U. S. 1, 8; *Maryland* v. *Soper*, 270 U. S. 9, 35; *Maryland* v. *Soper*, 270 U. S. 36, 43-44.

In the recent case of *Martin* v. *Creasy*, No. 157—October Term, 1958, the doctrine of abstention was applied for reasons appropriately applicable to the case at bar. As in *Martin*, the appellant can avail itself of various state legal remedies, which are noted elsewhere herein. It is properly the function of the Illinois courts to adjudicate the non-federal questions relating to the applicability and construction of the Illinois criminal statutes. After final

decision of the Supreme Court of Illinois, the appellant can still seek relief in this Court. Title 28, U. S. C. A., Sec. 1257. Such practice would promote the avoidance of a premature and perhaps unnecessary decision of a serious federal constitutional question and of the hazard of unsettling some delicate balance in the area of federal-state relationships. *Martin* v. *Creasy*, *supra*, concurring opinion.

To sanction federal intervention in state criminal affairs, while speedy state remedies are available, would only serve to disrupt the administration of state criminal justice. The recognition and appreciation of the delicate relationship between the federal and state sovereignties, particularly in matters affecting the administration of criminal justice, should resolve all doubts against federal intervention. Compare: *Stefanelli* v. *Minard*, 342 U. S. 117, 118, 123-124.

This policy of caution and abstention is peculiarly applicable to the instant case where neither the challenged criminal statute has ever been interpreted by the Supreme Court of Illinois, nor the question of the applicability of any Illinois gambling statute to the appellant's products has ever been determined by that court. *Fenner* v. *Boykin*, 271 U. S. 240, 243-244; *Watson* v. *Buck*, 313 U. S. 387, 401-402; *Essman* v. *Hood*, 45 F. 2d 881, 883.

III.

If this court has original jurisdiction and the doctrine of "discretionary abstention" is not applicable, the plaintiff is not entitled to any equitable relief because it has an adequate remedy at law.

Questions of the applicability of any Illinois gambling statute to the appellant's devices and to the constitutionality of the challenged act can be raised and determined

in the following proceedings: (1) the hearing before a judge, justice or court to determine the disposition of seized property (Chap. 38, Sec. 697, Ill. Rev. Stats.); (2) replevin (Chap. 119, Sections 1 *et seq.*, Ill. Rev. Stats.); (3) declaratory judgment (Chap. 110, Sec. 57.1, Ill. Rev. Stats.); (4) an action for damages if the property is destroyed. *Lawton* v. *Steele*, 152 U. S. 133, 142.

With reference to the hearing in accordance with Chap. 38, Sec. 697, Ill. Rev. Stats., it is the practice in Illinois to give proper notice to interested parties. This case is no exception.

It should also be noted that a prayer for injunctive relief can be joined with an action for declaratory judgment. *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334, 352. This appellant has the opportunity to seek the same relief in the Illinois courts—the proper forum for determination of the nonfederal questions present in this litigation.

We respectfully submit, therefore, that the appellant presents no substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed.

Benjamin S. Adamowski by Edward J. Hladis

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APPENDIX A.

Chap. 38, Sections 341-343, Ill. Rev. Stats.

AN ACT to prohibit the use of clock, tape, slot or other machines or devices for gambling purposes. [Approved June 21, 1895. L. 1895, p. 156.] *Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

341. OPERATING GAMBLING DEVICE — PENALTY.]

§ 1. Whoever in any room, saloon, inn, tavern, shed, booth or building or enclosure or in any part thereof operates, keeps, owns, rents or uses any clock, joker, tape or slot machine or any other device upon which money is staked or hazarded or into which money is paid or played upon chance, or upon the result of the action of which money or other valuable thing is staked, bet, hazarded, won or lost, shall upon conviction for the first offense be fined not less than one hundred ($100) dollars, and for a second offense be fined not less than five hundred ($500) dollars and be confined in the county jail for not less than six (6) months, and for the third offense shall be fined not less than five hundred ($500) dollars and be imprisoned in the penitentiary not less than two (2) years nor more than four (4) years. A coin-in-the-slot-operated mechanical device played for amusement which rewards the player with the right to replay such mechanical device, which device is so constructed or devised as to make such result of the operation thereof depend in part upon the skill of the player and which returns to the player thereof no coins, tokens or merchandise

shall not be considered to be a gambling device within the meaning of this Act and any right of replay so obtained shall not represent a valuable thing within the meaning of this Act. As amended by act approved July 7, 1953. L. 1953, p. 929.

342. GAMBLING DEVICE DEFINED—CONFISCATION—CERTAIN AMUSEMENT DEVICES NOT CONSIDERED GAMBLING DEVICES.]

§ 2. Every clock, tape machine, slot machine or other machine or device for the reception of money on chance or upon the action of which money is staked, hazarded, bet, won or lost is hereby declared a gambling device and shall be subject to seizure, confiscation and destruction by any municipal or other local authority within whose jurisdiction the same may be found. A coin-in-the-slot-operated mechanical device played for amusement which rewards the player with the right to replay such mechanical device, which device is so constructed or devised as to make such result of the operation thereof depend in part upon the skill of the player and which returns to the player thereof no coins, tokens or merchandise shall not be considered to be a gambling device within the meaning of this Act and any right of replay so obtained shall not represent a valuable thing within the meaning of this Act. As amended by act approved July 7, 1953. L. 1953, p. 929.

343. POSSESSION OF—PENALTY.]

§ 3. Every owner, occupant, lessee, mortgagee or other person in possession of any premises upon which any gambling device may be located and every person in the use, operation, lease or other possession of the same shall be fined for the first offense not less than one hundred ($100) dollars, and for the second offense

shall be fined not less than five hundred ($500) dollars and shall be confined in the county jail not less than six (6) months, and for the third offense shall be fined not less than five hundred ($500) dollars and shall be imprisoned in the penitentiary not less than two (2) years nor more than four (4) years.